SUPREME COURT, U. S.

NOV 9 1967

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No. 85

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR THE UNITED STATES

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1. Appellees' claim is that the penalty provisions of the Kidnaping Act place a burden on the constitutional right to trial by jury and tend to coerce a plea of guilty. From the premise—which is undeniably correct—that a jury recommendation of capital punishment is a precondition of its imposition, they reason as follows: By pleading guilty or waiving jury trial, the defendant escapes all risk that capital punishment will be imposed, whereas by standing on his right to jury trial he places his life in the jury's hands. Therefore, there is an inducement to forego jury trial in order to escape capital punishment.

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As explained in our opening brief, our primary response is that this Court need not reach the question whether a statutory scheme which created such an inducement not to contest in full measure would be unconstitutional. It is our submission that the likelihood of capital punishment is not materially affected by whether the defendant elects to be tried by jury.[1] Our argument on this point has two branches:

a. A defendant cannot, merely by attempting to plead guilty or to waive trial by jury, prevent imposition of capital punishment. The judge—as appellees concede—is perfectly free to refuse a guilty plea or jury waiver (F.R. Crim. P., Rules 11, 23(a)); and this is not infrequently done. Moreover, a judge who thought that he might be prepared to concur in the imposition of capital punishment if a jury so recommended would presumably feel obliged to secure the opinion of a jury on that question.

If, in such a case, the judge felt that a full trial would be inappropriate because guilt was conceded, he could accept the plea of guilty but then convene a

[1] Even if some element of inducement were thought to exist, it would not follow that the statute is unconstitutional. We distinguished *Griffin* v. *California*, 380 U.S. 609, as a case where the burden upon a constitutional right was the direct product of oppressive governmental action. In the instant case, as in the case of pleas to lesser offenses, any inducement not to contest guilt in full measure is the incidental and perhaps unavoidable consequence of a procedure designed not to discourage the assertion of constitutional rights, but to make punishment more flexible and less harsh. Certainly that is true of a statute like the Kidnaping Act which makes a jury recommendation a prerequisite to imposing the death penalty, precluding its imposition by the judge without such a recommendation.

jury for purposes of punishment. This practice has been followed in States having penalty provisions similar to those in the Kidnaping Act and by federal judges under the Kidnaping and Bank Robbery Acts (see our opening brief, pp. 11–12, notes 8 and 9). To our knowledge, its use has been rarely challenged, and never successfully (see *Seadlund* v. *United States*, 97 F. 2d 742, 748 (C.A. 7)).[2]

b. By electing trial by jury, the defendant in a Kidnaping Act case does not, in our view of the statute, subject himself to a materially greater risk of receiving a death sentence than had he sought to plead guilty or to waive jury trial. In the latter case, as noted above, the judge will presumably refuse the plea or convene a jury for punishment if he believes that a death sentence might be warranted. In the former case, the judge's view will also be controlling, because the jury's recommendation of capital punishment is not binding upon the judge.

Appellees press for a rigorous construction of the statute which would make the jury's recommendation of the death penalty conclusive. Their approach, seemingly, is that if the statute is construed with sufficient rigor, there may be more of a foothold for mounting a constitutional attack upon it. We see no compulsion to give the statute the reading they urge, especially in light of the precept that statutes are, wherever possible, to be construed so as to avoid, not engender,

[2] That a jury may determine the degree of an offense or the measure of punishment in a criminal case involving a plea of guilty is not a recent concept. See *Hallinger* v. *Davis*, 146 U.S. 314, rejecting the claim that due process *requires* the States to adopt such a procedure.

constitutional questions. Certainly, the statute is far less unequivocal than appellees contend. It does not provide that the defendant shall be punished by death in the discretion of the jury, but, rather, that the defendant shall be punished either by death or, if the death penalty is not imposed, by imprisonment. A necessary condition of punishment by death is that the jury "so recommend." It does not follow that that is a sufficient condition. Advisory juries and jury recommendations are a commonplace of legal procedure (see, *e.g.*, F.R. Civ. P. 39(c)). To view the jury recommendation of death as only advisory serves to mitigate the harshness of jury sentencing—a practice which appellee Jackson strongly criticizes as confiding the issue of life or death "to the unguided, unlimited discretion of twelve laymen"; as "repudiat[ing] every penological advance of the past century"; as "a means by which judges and legislatures shirk responsibility for the executions which they authorize"; and finally as "an anachronism which should be abolished" (Jackson brief, pp. 25–26). It is in keeping with the so-called rule of lenity, and it gives effect to the word "recommend", which in its ordinary usage certainly imports that the person to whom the recommendation is made (here, the sentencing judge) has the power to deviate as well as to follow.[3]

[3] Appellees question application of the rule of lenity to the 1934 Act on the ground that it was that Act which added the possibility of an enhanced penalty. Our point, however, is that the rule comes into play in deciding how the death penalty may be imposed. Congress obviously rejected the most drastic possibilities—a mandatory sentence of death or a sentence of death except where the jury affirmatively provides otherwise (see the

But even if we were to assume, *arguendo,* with appellees, (a) that the jury's recommendation of the death penalty is binding on the court and (b) that this creates an unconstitutional inducement to forego trial by jury (either on the premise that the judge may fail to convene a jury to consider the question of punishment, or that he lacks power to do so), it still would not follow that the answer would be to hold the statute unconstitutional, either in whole or in part. If it be assumed that Congress indeed intended the jury to be the sole determinant of the question of punishment, does it not follow that, in every case, the district court should impanel a jury to determine punishment or—if it be further assumed that the only jury which may determine punishment is the jury that considers the issue of guilt—refuse to accept a waiver of jury trial or plea of guilty? Certainly, it is the prerogative of the courts under the Criminal Rules to reject such waivers and pleas. It would also seem to be their duty to accommodate criminal procedures to the statutory scheme contemplated by Congress. This Court, in the exercise of its supervisory powers, could direct that course. It is the course, we note, which the State of Washington has formally adopted in implementing a similar statute making a jury recommendation of capital punishment prerequisite to its

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federal murder statute, 18 U.S.C. 1111). Concededly, the legislative history is not conclusive on the question whether judge and jury would have to concur before capital punishment might be imposed. We argue simply that the requirement of concurrence is a reasonable interpretation of the statute and of its history; that it is in keeping with the traditional role of the federal judge; and that the rule of lenity favors its adoption.

imposition. Rev. Code of Wash. Ann. (1961), §§ 9.48.030, 10.01.060, 10.49.010. The more lenient view of the statute, and the one we urge, is that the jury's recommendation on the issue of punishment is simply a recommendation and not a mandate. We do stress, however, that the issues posed by this case admit of reasonable solutions which avoid rather than create constitutional doubts.

2. We revert briefly to the question whether the entire Act fails if—contrary to our submission—the capital-penalty provision of the Kidnaping Act is invalid. Appellees argue that the provision cannot be severed because Congress failed to include an express provision for severability. However, it has never been the rule that an express severability clause is necessary to avoid total invalidation of a statute where only one of its provisions offends. *Champlin Rfg. Co.* v. *Commission,* 286 U.S. 210, was indeed a case where the legislature had provided for severing any invalid provision, but in stating the correct test the Court did not mention that fact. It stated, rather: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 234. And the Court then cited for this proposition cases where it had severed invalid provisions in the absence of any provision for severability. *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U.S. 601, 635; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U.S. 362, 395–396; *Field* v. *Clark,* 143 U.S. 649, 695–696.

Under the test of *Champlin*—whether Congress would have enacted the Kidnaping Act without the capital-penalty provisions here challenged—it is plain that the provision is severable. It was added by amendment two years after the original act was passed, and, appellees to the contrary notwithstanding, it is evident from a comparison of the original and amended acts that the amendment effected no substantial change in the scheme of the original act—save to add the possibility of the death penalty.[4] It is quite inconceivable

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[4] The original Act, 47 Stat. 326, provided:

> That whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward shall, upon conviction, be punished by imprisonment in the penitentiary for such term of years as the court, in its discretion, shall determine * * *.

As amended, 48 Stat. 781, the Act provided:

> Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed; or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by

that the 1934 Congress which decided to authorize the imposition of capital punishment in aggravated cases of kidnaping would have chosen to discard the entire statute if advised that it could not go beyond the maximum penalty (life imprisonment) provided by the 1932 enactment. The fundamental reason which prompted the so-called Lindbergh Law, in 1932—the fact that state lines had proved an obstacle to effective police work and to securing witnesses—was no less compelling two years later when the statute was strengthened. See, generally, Bomar, *The Lindbergh Law*, 1 Law and Contemporary Problems 435 (1934).

3. It remains only to note an issue that is not in this case. Appellee Jackson urges (Jackson Brief, pp. 24–25): "Affirmance of the decision below will be a great stride toward eliminating the death penalty from American law. As such, it will be one of the most significant, humane, and sensible decisions of the decade. The death penalty will be nudged toward extinction * * *." But the question whether the death penalty should be abolished is not before this Court, and it is a legislative rather than a judicial issue. Indeed, it is wholly extraneous to the present case, since appellee Jackson concedes that, if the only pen-

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imprisonment in the penitentiary for such term of years as the court in its discretion shall determine * * *."

Plainly, the addition of the provision for capital punishment was the only substantial change in the relevant portion of the Act. (The omitted portions in the above quotations define interstate commerce and punish conspiracies to kidnap. These provisions were unchanged in the 1934 amendment, save that a provision was added creating a presumption of interstate transportation where the kidnaped individual is not liberated within seven days of the kidnaping.)

alty prescribed by Congress for violations of the Kidnaping Act were death, none of the constitutional questions here presented would arise (Jackson brief, p. 29).

In stressing the irrelevance here of views as to the wisdom of capital punishment, we intimate no approbation of the practice. The Department of Justice is on record as favoring the abolition of the death penalty. See Letter from Ramsey Clark, Deputy Attorney General, to John L. McMillan, Chairman, District of Columbia Committee, House of Representatives, July 23, 1965, in re H.R. 559. Our point is merely that the question is one for Congress, not for the courts.

Respectfully submitted.

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NOVEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967